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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS B= OARD

FIRST REGION

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| In the Matter o= f | |
| DEAN FOODS NORT= HEAST LLC d/b/a GARELICK FARMS/DEAN FOODS | |
| &nbs= p; &= nbsp; &nbs= p; Employer | |
| &nbs= p; &= nbsp; and | Case 1-RC- |

21996

INTERNATIONAL
ASSOCIATION
OF MACHINISTS
AND
AEROSPACE
WORKERS,
DISTRICT 15,
AFL-CIO

&nbs=
p; &=
nbsp; &nbs=
p; Petitioner

DECISION AND DIRECTION OF ELECTION= [\[1\]](#)

&nbs= p; The Union seeks to represent a unit of about 250 truck drivers employed by Dean Foods Northeast LLC d/b/a Garelick Farms/Dean Foods at its facility in Franklin, Massachusetts. The Union maintains that 14 driver/foremen are statutory supervisors who should be excluded from the unit, while the Employer asserts that these individuals are non-supervisory employees who should be included in the unit. The Employer asserts that the unit should also include 14 yardmen and two yardman foremen. The Union contends that the petitioned-for unit is an appropriate unit, that the yardmen^[2] do not share a sufficient community of interest with the drivers to be included in the unit and, further, that the two foremen are statutory supervisors. The Employer takes the position that the two yardman foremen are non-supervisory employees.^[3] I find that the 14 driver/foremen are non-supervisory employees and I have included them in the unit. I further find that the unit sought by the Union is appropriate and, therefore, that the yardmen should not be included in the unit.

Background=

&nbs= p; The Employer operates a distribution facility in Franklin, Massachusetts, where it is engaged in the processing and distribution of dairy products. Lawrence Bourget is the director of distribution and is responsible for all delivery operations. The drivers, driver/foremen and ya= rdmn at issue in this case are part of the distribution department. The distribution department delive= rs dairy products produced at the Franklin facility and at other locations of the Employer to its customers, including supermarkets, convenience stores, hospitals, and nursing homes.

&nbs= p; The Employer's drivers work in the job classifications of case trailer drivers, straight truck drivers, bossy drivers, runners, universal runners, transportation drivers, and driver/foremen. With the exception of the transport= ation drivers, all drivers and driver/foremen report to one of the three shift supervisors: the first shift supervisor is Lou Menard; the second shift supervisor is Ed Syngay; and the third shift supervisor is Steve Lussier. The transportation drivers report = to Transportation Supervisor Bob Henault. These= four supervisors report directly to Bourget.

&nbs= p; Scott Henault is the fleet coordinator who oversees the outside contractor truck maintenance operation and supervises the 14 yardmen and two yardmen foremen= .

Scott Henault reports to Bourget. Keith Archambault is the yardmen supervisor, reporting to Scott Henault.[\[4\]](#)

&nbs= p; Several other management officials report to Bourget, including DSD Routing Manager= Arthur Boutiette, Routing Supervisor John Zardeskas, Customer Service Supervisor Al Mucciarone, Distribution Service Supervisor Linda Pimental, Route Recon/Distribution Supervisor Sharon Murray, DOT Compliance Supervisor Brian Nadeau, and Telemarketing Supervisor Theresa Nadeau.[\[5\]](#)

A. The Appropriate Unit=

As noted above, the Union contends that a unit limited to the Employer's drivers constitutes an appropriate unit. The Employer contends that the unit should also include 14 yardmen and two yardmen foremen because of the community of interest they share with the drivers. The Union argues that the yardmen do not share a sufficient community of interest with the drivers to warrant their inclusion in a unit of drivers by virtue of their separate supervision, duties, lack of interchange and transfers, different uniforms, locker rooms, and break areas, and limited contacts with the drivers.

1. Facts

The drivers deliver product over the road in the seven job classifications identified above. Case trailer drivers are assigned specific routes and deliver bulk milk products to supermarkets using a tractor trailer. Straight truck drivers are assigned specific routes and deliver to convenience stores and supermarkets. Bossy drivers have assigned routes delivering milk on bossy carts [6] to supermarkets using a tractor trailer. Runners have assigned routes covering for other drivers on their scheduled days off. [7] Universal runners have a set schedule, but run different routes each week and cover for employees on vacation or worker's compensation, and for open routes, driving both straight trucks and tractor trailers. Transportation drivers are older drivers who drive tractor trailers and make runs to and from the warehouse. There is less physical work involved in these runs than in the Employer's other driving work. Driver/foremen are responsible for a group of about 15 distribution routes on which they cover if a driver cannot work for any reason. They drive any type of vehicle and may cover routes outside their own group, if necessary. Driver/foremen are on call 24 hours a day, 7 days a week. They work 5 to 7 days a week. Unlike other drivers, overtime for driver foremen is mandatory; they may not refuse a run when they are on-call. The driver/foremen's primary duties are to make certain that their routes are covered each day. Driver/foremen spend about 90-95 percent of their time performing the same driving duties as other drivers. Driver/foremen are also involved in the training of new drivers and the follow up training of more experienced drivers. According to Bourget, the director of distribution, this training function takes about 5 percent of the driver/foremen's time.

With the exception of transportation drivers, drivers' hours vary according to the route they are assigned. They begin anywhere from midnight to 6:00 am and work until they have completed their route, which can be as much as 14 hours after their start. The drivers are scheduled by

Bourg= et. Their routes are assigned by Bourg= et according to seniority. Transportation drivers also have varied shift schedules beginning at times between 3:00 am= and 4:00 pm, and work until their assignment is completed. The transportation drivers are sch= eduled by Transportation Supervisor Bob Henault, who also gives them their daily a= ssignments.

& nbs= p; Yardmen also have varied start times, but work 3 set shifts of 8-12 hours daily. Their hours and work assignments a= re scheduled by Fleet Coordinator Scott Henault, who is in charge of disciplin= ing the yardmen. Scott Henault testified that yardmen work a rotating schedule of 2 days on and 1 day off. The yardmen's duti= es primarily include moving trucks, tractors, and trailers from their assigned parking spaces to the various departments of the Employer where they are lo= aded and unloaded. Yardmen service different departments daily. = These assignments are made by Scott Henault. Ya= rdmen generally move the trailers by means of a vehicle known as a yard horse, but will occasionally drive the same tractor or truck used by the driver. Yardmen are responsible for checki= ng trailers to see if they are loaded or unloaded, and checking the refrigerat= ion unit to make certain it is fueled. <= /span>Yardmen supervisor Keith Archambault spends about 70 percent of his time performing yardman duties. The two yardm= en foremen, Edward Fortes and Alan Malloy, spend 90-95 percent of their time performing the same duties as other yardmen. They are higher paid than other ya= rdmen because their role is to fill in for other yardmen when needed.

& nbs= p; There is no regular interchange between drivers and yardmen. Yardmen never fill in for drivers = on their routes. Bourget testifi= ed that, on infrequent occasions, driver/foremen will assist yardmen if they h= ave no other assignment. Scott He= nault testified that, about 2-4 times a year, a yardman will be assigned to drive= a new tractor out to a driver who has broken down on the road. The yardman does not assist the dr= iver on his delivery route. Scott Henault also performs this function about twice yearly.

Drivers and yardmen have co= ntacts during the work day. Drivers = will, on occasion, ask yardmen to assist them in locating their truck or trailer = when it is not in its assigned space. Drivers may have difficulty in hooking up their tractor to the trail= er, in which case a yardman will assist him with his yard horse. Scott Henault testified that drive= rs and yardmen share certain functions, including backing trailers into the empty pit. In some cases, drivers w= ill back their own trucks or trailers into the department. Scott Henault testified that 40 pe= rcent of the bossy trailers are backed into the empty case

room by the drivers, while the remainder are backed in by yardmen. Drivers will also, on occasion, bring their trailer back to the Employer from their route for pickups, particularly if they are in a hurry.[8] The frequency of this occurrence is not disclosed in the record.

There is no evidence that a yardman has ever transferred to a driver position. Two current yardmen were formerly drivers who transferred to become yardmen because they were having difficulties performing as drivers.

The drivers, driver/foremen, and yardmen are all hourly paid hourly, receive their pay once a week, and receive overtime. All employees receive the same benefits from the Employer. All drivers receive the same wage increase each January. Yardmen receive a similar annual wage increase, but receive it on their anniversary date. Because they are on call, foremen are paid \$2.50 more per hour than the next highest paid driver. Drivers and yardmen receive the same Thanksgiving and Christmas bonuses, and are eligible for the Employer's safe driver bonus.

All drivers are required to have a commercial driver's license (CDL). There is no requirement that yardmen have a CDL, though 10 of the yardmen have those licenses. The drivers have their own locker room, while the yardmen have a separate locker room located over the garage. All employees punch the same time clock, located in the drivers' locker room. All drivers and yardmen attend the Employer's annual safety awards banquet. The drivers, driver/foremen, and yardmen each wear different uniforms. The driver/foremen uniform has a patch reading "foreman." Drivers and yardmen do not take breaks together, as the drivers are out on the road while the yardmen work in the yard.

The Employer has a drivers' committee which meets bi-monthly to discuss driver issues. Members of the committee volunteer to serve on it. There are no yardmen or driver/foremen on the drivers' committee. Bourget testified that there are no rules prohibiting either yardmen or driver/foremen from participating on the drivers committee. Driver Jonathan Rothgeb testified that it is "common knowledge" that driver/foremen cannot serve on the drivers' committee and that Gerry Marcotte, a driver, was a member of the drivers committee until he became a driver/foreman, at which point he resigned from the committee.

&= nbsp; 2. Analysis

&nbs= p; In determining an appropriate unit, the Board considers first the petitioned-f= or unit. If that unit is approp= iate, then the inquiry ends. If the petitioned-for unit is not appropriate, the Board may examine the alternate unit proposals proposed by the parties, but it also has the discretion to select an appropriate unit that is different from those proposed by the parties. *The Boeing Company*, 337 NLRB 152 (2001); *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retar= ded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997). In determining the appropriate uni= t, the Board generally attempts to select a unit that is the smallest appropriate = unit encompassing the petitioned-for employee classifications. See, e.g., *Bartlett Collins Co.*, 334 NLRB 484 (2001), and *State Farm Mutual Automobile Insurance Co.*, 163 NLRB 677 (1967)= . In deciding whether a unit is appropriate, the Board weighs various factors, including differences in the wages, hours, and other working conditions; commonality of supervision; deg= ree of skill and common functions; frequency of contact and interchange with ot= her employees; and functional integration.&nbs= p; *Overnite Transportation Co.*<= /i>, *supra*; *Ore-Ida Foods*, 313 NLRB = 1016 *affd.* 66 F.3d 328 (7th Cir. 1995). *It is well settled Board law that a union need not seek to represent the most appropriate unit or the most comp= rehensive unit, but only an appropriate unit. Transerve Systems*, 311 N= LRB 766 (1993); *Morand Bros. Beverages = Co.*, 91 NLRB 409 (1950). *The petit= ioner's desire as to the unit is a relevant consideration, though not dispositive.*<= span style=3D'mso-spacerun:yes'> *Florida Casino Cruises*, 322 NLRB 857, 858 (1997), citing *Airco, Inc.*, 273 NLRB 348 (1984).

&nbs= p; While the larger unit proposed by the Employer may also be an appropriate unit, I find that the unit of drivers sought by the Union is an appropriate unit. While= the grouping sought by the Employer consists of all employees whose functions a= re part of the team that allows the Employer to operate its delivery operation= s, I find, nonetheless, that the function and working conditions of the drivers = are distinct enough to warrant their own collective-bargaining unit.

&nbs= p; Unlike the yardmen, the drivers spend most of their time away from the plant making deliveries to the Employer's customers. Indeed, the Employer's super= visory structure reflects the separate identity of the drivers' work. The drivers and yardmen are each separately supervised by first line statutory supervisors who report to Director of Distribution Lawrence Bourget.= It is Bourget who schedules and assigns routes to the drivers. On the other hand, while Fleet Coo= rdinator Scott Henault also reports to Bourget, it is Henault who schedules and assi= gns work to the yardmen. As a con= dition of their employment, drivers are required to possess a CDL, while yardmen a= re not. The drivers and yardmen = are compensated differently and wear different uniforms.

& nbs= p; *The yardmen do not perform the drivers' work and at no time do they fill = in for drivers. While there is evidence that the yardmen may, on occasion, drive vehicles, this driving is= not the type of driving performed by the drivers. Rather, as was the case in Overnite Transportation Co.,[\[9\]](#) the driving done by yardmen is related to breakdowns of driver vehicles and= is of a different nature than that of the petitioned-for unit employees. As for the two drivers who transfe= rred to become yardmen, the testimony establishes that these transfers were voluntary due to the employees' inability to perform driver duties. See e.g., *Red Lobster*, 300 NLRB 908, 911 (1990); *Lipman's*, 227 NLRB 1436 (1977)(voluntary permanent transf= ers given less weight in unit determinations).*

& nbs= p; *The fact that the drivers have work related contact with the yardmen, that they occasionally assist one another in duties such as locating, backing up, and hooking up vehicles, and that the two groups share some benefits and working conditions are not sufficient to compel the inclusion of the yardmen in the unit. Rather, it appears that= the drivers and yardmen each perform their distinct functions. *Mc-Mor-Han Trucking Co.*, 166 NLRB 700 (1967)(mechanics excluded from petitioned-for unit of drivers even though drivers perform minor mechanical work and mecha= nics perform truck driving duties that were incidental to their responsibilities.) See also *Gogin Trucking*, 229 NLRB 529, 538 (1977).*

*I find that the cases cited= by the Employer are distinguishable and do not warrant a different result. In *E.H. Koester Bakery Co., Inc.*, 136 NLRB 1006 (1962), the petitioner sought to exclude, among others, three truck drivers from a production and maintenance unit. The Board held that the inclusion of drivers in a more comprehensive unit was not required. *Kalamazoo Paper Box Corporation*, 136 NLRB 134 (1962) involved a petition to sever truck drivers from a unit represented by another labor organization. The drivers were not found to have= a sufficiently distinct community of interest for severance because they spent a substanti= al amount of their time working along side, and performing the same duties as,= the production and maintenance employees with whom they had regular interchange. In *Standard Oil Company*, 147 NLRB 1226 (1964), the Board included other employees in a petitioned-for unit of truck drivers based on the fact that the truck drivers, unlike here, spent a substantial amount of their time performing the same functions as other emp= loyees. In *Philco Corporation*, 146 NLRB 867 (1964), the Board included other employees in= a truck drivers' unit based on its finding that the truck drivers spent most = of their time loading and unloading trucks rather than driving trucks, were off plant property driving only 5 percent of the time, and had substantial interchange with warehouse employees, whose actual duties were similar to t= he truck drivers. In *Donald Carroll Metals, Inc.*, 185 NLRB 409 (1970), truck drivers were included in a production and maintenance unit where they spent 35-40 percent of their time in the plant and 80 percent of that time they were engaged in the same duties as other employees. Similarly, *Trans-American Video*, 198*

NLRB 1247 (1972)(where petitioner sought truck drivers in a wall-to-wall unit, sufficient community of interest found to warrant inclusion) and Calco Plating, Inc., 242 NLRB 1364 (1979)(where petitioner sought to exclude truck drivers from production and maintenance unit, inclusion found warranted based upon each group regularly performing the duties of the other) do not warrant a different result.

In sum, I find that the community of interest among the drivers and yardmen is sufficiently distinct to warrant approval of the unit sought by the Union. NLRB v. Laidlaw Waste, 934 F.2d 898, 137 LRRM 2631 (7th Cir. 1991).[\[10\]](#)

B. The Supervisory Status of Driver/Foremen

** 1. Indicia of Supervisory Status**

* The Union asserts that the 14 driver/foremen are statutory supervisors by virtue of their authority to discipline and evaluate employees. The Union also relies upon several driver/foremen job descriptions, and a variety of secondary indicia, in contending that driver/foremen are statutory supervisors.*

* * **Discipline**

* The Employer has a progressive disciplinary system involving the use of employee counseling forms. The forms have 5 steps in the disciplinary process. Step 1 is the supervisor's discussion, step 2 is an "oral written warning,"[\[11\]](#) step 3 is a final written warning, step 4 is suspension, and step 5 is termination.*

* The Union presented four witnesses who testified about discipline. Nicholas Ph=*

Phoenix, who has been a driver for three years, testified that he has been written up by driver/foremen on two occasions. Phoenix said driver/foreman Roger Bouillett wrote him up for taking too long on his route about two years ago. Phoenix could not recall if Bouillett signed the write-up or if Bouillett presented it to him. Phoenix testified that, on a date he did not identify, driver/foreman Gerry Marcotte wrote him up for being late. Marcotte signed the write-up and presented it to Phoenix. Phoenix testified that he requested his personnel file from the Employer, but found neither write-up in it. Phoenix was not aware of any other employee counseling forms completed by driver/foremen.

Joseph Fonseca has been a driver for the Employer for eight years. He was a driver/foreman from 2003 until early 2005. He testified he was told he was a member of management in foremen's meetings. Fonseca testified that, on one occasion, he was assigned by Bourget to go with a driver because the driver had been taking too long on his route. When the driver did his route in three hours less than he had been taking, Fonseca wrote him up at step 2 of the disciplinary procedure (oral written warning). As to the write-up, Fonseca testified he "passed it on to Larry" Bourget. Fonseca testified that he, Bourget, and the driver sat down and discussed why the driver was taking so long. Fonseca conceded that he might have been acting for Shift Supervisor Steve Lussier when this incident occurred. This was the only time Fonseca wrote up a driver as a driver/foreman.

Jonathan Rothgeb, a driver for 18 years, testified that he was written up by driver/foreman James Lapierre in December 2005 for taking too many days off, after being orally counseled by Lapierre. Rothgeb testified that he was given the write-up by one of the office personnel and that it was signed by Lapierre and by Bourget. Rothgeb could not find a copy of this document in his personnel file. Rothgeb further testified that he did not know who made the decision to issue him the write-up. Rothgeb recalled that there had been one other counseling session by a driver/foreman that he was aware of during his tenure with the Employer, but he could not remember any specifics with respect to it.

James Vitiello held the position of driver/foreman for 10 years. Vitiello testified that he could not recall being told he was part of management while a driver/foreman. While Vitiello testified that driver/foremen had the authority to issue written warnings, he further stated that he would not do so without first consulting with a supervisor about the situation, and that the supervisor would instruct him as to what to do, including whether to fill out an employee counseling form. Vitiello testified that driver/foremen were not involved in suspensions or terminations, and that he had never been involved in discipline beyond step 2 of the disciplinary procedure. Vitiello later testified that driver/foremen could fill out employee counseling forms through step 4 (suspension) of the disciplinary procedure.

Vitiello also testified that driver/foremen were responsible for writing up the facts of the incident, which he distinguished from being involved in the decision to discipline.

* p; Jeffrey Trudeau has been a driver/foreman for 18 years. Trudeau testified that he has never been told he was a supervisor. He testified that driver/foremen do not have the authority to issue discipline, only to report facts of what occurred to management. He testified that driver/foremen can issue discipline only when acting as supervisors, which he said he did infrequently. Mariano Pereira, a driver/foreman for the past eight years, also testified that he had never been told he was a supervisor and that he had no authority to issue a warning to employees. Pereira testified that the only time he has issued a warning was about four years ago when he was acting for Shift Supervisor Steve Lussier.*

Director of Distribution Lawrence Bourget testified that the stipulated supervisors only have authority to issue discipline through step 3 of the disciplinary process. Bourget makes all decisions regarding suspensions and terminations at steps 4 and 5. Bourget also informs employees of the discipline imposed. Bourget testified that the authority of driver/foremen is limited to reporting an incident to a supervisor by use of the employee counseling form, which they sign on a line titled "supervisor," there being no other space on the form for them to sign. The discipline to be issued is then determined by Bourget. The only exception to this rule occurs when driver/foremen function as acting supervisors, in which case they are vested with the same authority as the supervisor they are replacing. All employee counseling forms are co-signed by a member of management, generally Bourget or DSD Routing Manager Arthur Boutiette. Bourget testified that counseling reports are not valid as a disciplinary action unless signed by him.

* p; The Employer introduced into evidence 330 employee counseling forms which had been issued to employees in 2005-2006. Of that 330, only 14 were signed by driver/foremen; the remainder were signed by stipulated supervisors. Bourget testified that driver/foreman Gerry Marcotte was on light duty for about three months during 2005, a period when he functioned as an acting supervisor. As an acting supervisor, he had the authority to issue discipline. Of the 10 employee counseling forms signed by Marcotte introduced into evidence, 9 were signed while he was an acting supervisor.[\[12\]](#) The Employer also introduced evidence of six step 2 oral written warnings and two step 3 final written warnings received by Jonathan Rothgeb during 2004 and 2005. All were signed by stipulated supervisors Arthur Boutiette or Lawrence Bourget; none were signed by driver/foremen.*

&nbs= p; Evaluations

The Employer does not have a formal employee evaluation system. The Union, however, contends that the driver/foremen evaluate employees by virtue of their performing road tests on drivers and completing an evaluation of their performance. Driver/foremen will, on occasion, also time driver routes.

&nbs= p; *Nicholas Phoenix testified that driver/foreman Roger Bouillett gave him a road test when Phoenix, a straight truck driver at the time, bid on a route as a tractor trailer driver. Bouillett completed a form, admitted into evidence, which assessed the driver's ability to perform certain driving skills and had a section entitled "general performance assessment" which gave the driver a summary rating. Phoenix testified that the form was turned in to Bourget, but he was not certain whether at discretion Bourget had in deciding whether to award him the bid.*

Joseph Fonseca testified generally that driver/foremen perform driver evaluations to determine whether a driver is performing well. Fonseca testified that these driver evaluations were mostly performed by foremen, but sometimes by supervisors. Fonseca distinguished these driver evaluations from the driving tests for new hires which are administered by shift supervisor Ed Syngay. Fonseca testified that these driver evaluations were performed by the driver/foreman being assigned to ride with the driver and observe his driving. The driver/foreman would complete a form relating the driver's performance. While the form has categories called "driver evaluation" and "route evaluation" there is no category soliciting a recommendation from the driver/foreman. In describing these "driver evaluations," it appears Fonseca was describing the timing of routes by driver/foremen, since he testified that the form used in the evaluation was the same form used by the Employer in timing drivers' routes. Fonseca performed about a dozen of these driver evaluations in his first six months as a driver/foreman. Fonseca testified he turned the forms in to the distribution supervisor upon completion, but he did not know what happened to them or how they were used thereafter. The frequency with which Fonseca performed driver evaluations diminished over time because he spent more time driving his own routes. Fonseca testified that he timed driver routes 3-4 times during his service as a driver/foreman.

James Vitiello, who was a driver/foreman for about 10 years, testified, without specificity, that he did general performance ratings of drivers by riding with them to time their routes during his time as

driver/foreman. He would do this only when assigned to do so by Bourget or shift supervisor Lou Menard. Vitiello testified that he performed these driver evaluations using the same two-sided form Fonseca identified above. Vitiello rode with the driver, observed his performance, and recorded his observations on the form, which he discussed with the driver. Vitiello turned the form in to Bourget and was not certain what happened with it thereafter. Vitiello believed that drivers could be disciplined by Bourget based on these evaluations, but he was never consulted concerning them. Vitiello completed 15-20 of these evaluations during his time as driver/foreman, but only two in his last five years in the position because he spent so much time driving his own routes.

Vitiello further testified that, on one occasion about four years ago, he was assigned by Bourget to follow a driver who was suspected of sleeping on his route to time him. Vitiello made a verbal report to shift supervisor Menard of his observations and was not further involved in the process with the driver. Vitiello testified that driver/foremen being assigned to follow drivers was a rare occurrence.

Lawrence Bourget testified that about 10 percent of road tests performed on new drivers are done by driver/foremen, while the remainder are performed by shift supervisors Ed Syngay and Lou Menard. The form is completed, reviewed by DSD Routing Manager Arthur Boutiette and sent on to human resources, which makes the decision whether or not to hire.

As to timing routes, only Bourget has the authority to decide that a route should be timed. Both driver/foremen and supervisors may be assigned to time routes, which occurs about 20 times a year, according to Bourget. In completing the "driver evaluation" section of the route timing form, the driver/foremen is expected to note any difficulties the driver is having on his route that would relate to the time it takes him to complete the route. The forms are reviewed by supervisors and, ultimately, by Bourget. Bourget testified that drivers are never disciplined based on the route timing forms; they may, however, be given additional training.

Jeffrey Trudeau has been a driver/foreman for 19 years. He testified that there have been no performance evaluations of drivers completed by driver/foremen for 15-16 years. Trudeau testified that he times routes and gives road tests, each of which take about 1 percent of his time. Trudeau testified that the person giving the road test, including driver/foremen, decide whether the driver passed the road test. Upon completing the form, the driver/foreman turns it in to the supervisor, who passes it on to human resources for their determination.

 p; *Mario Pereira has been a driver/foreman for 11 years, during which time he has given only two road tests. Pereira testified that, other than completing the road test report, no other information or recommendation was requested of him by management. Pereira testified that, other than timing routes and performing road tests, he has had no involvement in evaluating a driver's performance.*

 p; *Job Descriptions*

 p; *The Union relies upon three documents, identified as job descriptions, in support of its position that the driver/foremen are statutory supervisors. The most recent of these is a single page document titled "Foreman Responsibilities." This document generally states that the distribution route foremen "supervise the day to day activities of assigned routes and drivers" and are "responsible for driver performance and labor costs related to assigned routes and drivers." Joseph Fonseca testified that this document was passed out at a foremen's meeting around November 2004. James Vitiello, on the other hand, testified that this document was attached to the second document described below dated 8/20/03, and was received at a meeting.*

The second of these documents is a 3 page document titled "Position Description Distribution Route Foreman" and is dated 8/20/03. This document generally states the same responsibilities as the document described above. Fonseca testified that he was not given this document by management, but found it one day in his foreman's mailbox.

 p; *The final document is a 3 page document titled Wholesale Foreman General Job Description. James Vitiello testified that he received this document about 10 years ago. This document describes the position as a working member of management with both field and office responsibilities.*

 p; *Bourget testified that the job descriptions introduced by the Union are not currently in*

use by the Employer. There is currently no job description in effect for the driver/foreman position. Bourget testified that, when a new driver/foreman is hired, Bourget verbally informs him of the duties and responsibilities of the position and does not distribute a written job description. As to the document dated 8/20/03 and the single page document titled "Foreman Responsibilities," Bourget testified that he had never seen either before, that they were not used in his department or distributed by the Employer. As to the Wholesale Foreman General Job Description, Bourget testified that it was 10-12 years old, was no longer in use, and is not currently used as the job description for the driver/foreman position. Bourget further testified that each of these job descriptions contained inaccuracies relative to the current duties of the driver/foreman position.

Secondary Indicia

The Union relies upon a number of secondary indicia of supervisory status in support of its position that the driver/foremen are statutory supervisors. The Union points to the facts that the driver/foremen are higher paid than the drivers and wear a somewhat different uniform, including a patch reading "foreman." The driver/foremen are given cell phones by the Employer and have mandatory overtime, while drivers do not receive cell phones and their overtime is voluntary. Driver/foremen have meetings three times yearly without the drivers where issues relating to driver/foremen are discussed. The Union contends that driver/foremen are not eligible to participate on the drivers' committee, which exists to discuss issues related to the drivers.

The driver/foremen have keys to the night supervisor's office, which they may use to do their paperwork. Drivers do not have keys to that office and are not allowed to use it. Drivers call in sick to the driver/foremen and are given cards with the driver/foreman's phone number on it. Driver/foremen have received a bonus that other drivers did not receive. Driver/foremen and their wives were taken by the Employer to dinner in February 2006 at the Foxwoods casino and given \$200 in cash. Finally, the Union contends that driver/foremen are assigned to "spy" on drivers by following them on the road, referring to the testimony of Vitiello described above. The Union argues this function demonstrates the supervisory status of driver/foremen. Driver/foremen also received a \$1000 bonus five years ago which drivers did not receive.

The Employer presented evidence that driver/foremen are paid more than other drivers because of the requirement that they are always on call. As to the mandatory overtime, the Employer argues that this is not an indication of supervisory status, but a requirement of the position to make

certain that all routes are covered. The Employer issues driver/foremen= cell phones because it needs to contact them due to their on-call status. The Employer presented testimony t= hat there is no prohibition against driver/foremen serving on the drivers' committee and service is voluntary.

The driver/foremen have key= s to the night supervisor's office because their time cards are stored there f= or security reasons. While they = may do their paperwork in the night supervisor's office, they also do it in = the drivers' room alongside other drivers. The record indicates that employee= s do call in sick to driver/foremen, particularly on weekends when the office is closed. Driver/foremen, howev= er, have no authority to call in replacements.= They either cover the route themselves or, if they are unavailable, = they call a supervisor who obtains coverage.&nb= sp; The Employer presented testimony that the driver/foremen received one bonus in the past 5 years which the drivers did not receive. The Employer admits that the driver/foremen and their wives were taken to Foxwoods. Both of these benefits were confer= red in appreciation for the extra hours driver/foremen were required to work during difficult circumstances for the Employer.[\[13\]](#) As to "spying" by driv= er/foremen, the Employer contends that driver/foremen are rarely assigned this task, a = fact conceded by Vitiello in his testimony. The Employer argue= s that this function does not demonstrate supervisory authority because the driver/foremen merely record their observations and have no authority to act upon them.

&= nbsp; 2. Analysis

&nbs= p; Pursuant to Section 2(11) of the Act, the term "supervisor" means any in= dividual having authority, in the interest of the employer, to hire, transfer, suspe= nd, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is = not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act.&nbs= p; Rather, possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp., 273 NLRB 1= 677, 1689 (1985). The status of a supervisor under the Act is determined by an individual's duties, not= by his title or job classification. New Fern Restorium Co., 175 NLRB 8= 71 (1969). The burden of proving supervisory status rests on the party alleging that such status exists. NLRB v. Kentucky River Community Care, 532 U.S. 706, 121 S.Ct. 1861, 167= LRRM 2164 (2001). The Board will r= efrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protec= tion of the Act. Quadrex Environmental Co., 3= 08 NLRB 101, 102 (1992).

 = p; As noted above, the Union asserts that the = 14 driver/foremen are statutory supervisors by virtue of their authority to di= scipline and evaluate, because of the language of their job descriptions, and becaus= e of several secondary indicia of supervisory status. I find that the Union has failed to meet its burden of proving that the driver/foremen exercise Section 2(11) authority.

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 = p; Discipline

 = p; The Union has failed to demonstrate that dri= ver/foremen have authority to impose discipline. There is conflicting evidence as to whether driver/foremen have the = authority to issue discipline. Nicholas Phoenix received a counseling form from Gerry Marcotte, who the record indicates spent several months as an acting supervisor. Joseph Fonseca only issued one counseling form while a driver/foreman, which may have occurred while he wa= s an acting foreman. Jonathan Roth= geb received a counseling form signed by driver/foreman James Lapierre, which w= as also signed by Bourget. Howev= er, the form was not given to him by Lapierre and Rothgeb did not know who made= the decision to issue the discipline. Rothgeb did say he had been orally counseled by Lapierre. James Vitiello gave conflicting testimony. While stating that= driver/foremen had the authority to issue discipline, he also stated that he would not do = so without consulting a supervisor, who would instruct him what to do. Vitiello also said that driver/for= emen could fill out employee counseling forms through step 4 of the procedure, b= ut later said they were responsible only for writing up the facts on the incid= ent.

On the other hand, consiste= nt with the testimony of Lawrence Bourget, driver/foremen Jeffrey Trudeau and Maria= no Pereira testified that they do not have the authority to issue discipline unless th= ey are acting as a supervisor, which the testimony establishes occurs infreque= ntly. Otherwise, driver/foremen merely r= eport the facts of an incident to a supervisor who decides upon the appropriate discipline. Merely reporting = the facts concerning a particular incident without more does not establish supervisory status, especially where the decision to discipline is made by = an admitted supervisor. Express Messenger Systems, 301 NLR= B 651, 653-654 (1991). The disciplin= ary reports submitted by the Employer demonstrate that the vast majority of discipline is issued by statutory supervisors, countersigned by Bourget or Menard.

Even viewing the evidence in the light most favorable to the Union, the evidence falls far s= hort of establishing that driver/foremen have the authority to issue discipline. The testimony est= ablishes that

driver/foreman have authority to issue discipline when filling in for supervisors, an infrequent occurrence. Where purported supervisors exercise statutory supervisory authority= only when substituting for supervisors and that substitution is irregular and sporadic, that is insufficient to establish supervisory authority. Hexacomb Corporation, 313 NLRB 983 (1994); Latas De Alumino Reynolds, 276 NLRB 1313 (1985). There is also conflict in the record as to whether the driver/foremen have ever been told they were supervisors. The Board has declined to find individuals to be supervisors based on alleged authority that they were never notified that they possessed and where its exercise was sporadic and infrequent. Volair Contractors, Inc., 341 NLRB No. 98, slip op. at 3 (Apr. 30, 2004).

The documents and testimony establish that the vast majority of disciplinary actions are issued by statutory supervisors and are signed off by a management official, usually Bourget. It appears that the issuance of discipline by driver/foremen has been isolated and sporadic. It is well settled that the exercise of supervisory authority on such an occasional basis is insufficient to establish supervisory status. Byers Engineering Corp., 324 NLRB 740, 741 (1997), citing Bowne of Houston, 280 NLRB 1222, 1223 (1986). Finally, the Board has held that the issuance of verbal reprimands, such as the one issued to Rothgeb, are too minor a disciplinary function to constitute supervisory authority. Ohio Masonic Home, 295 NLRB 390, 394 (1989). For these reasons, I conclude that the Union has failed to meet its burden of establishing that the driver/foremen are supervisors based on their authority to discipline.

Evaluations

The Union has not met its burden of establishing that the driver/foremen are supervisors by virtue of their authority to evaluate employee. In this connection, the Union contends that driver/foremen evaluate drivers by completing forms on driver performance on road tests and in the timing of routes.

The Board has held that the authority to “evaluate” is not one of the indicia of supervisory status set out in Section 2(11) of the Act. Elmhurst Extended Care Facilities, 329 NLRB 535, 536 (1999). Accordingly, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated the individual performing such an evaluation will not be found to be a statutory supervisor.” Id. In this case, even assuming the road tests and timing of routes performed by driver/foremen constitute evaluations, there is insufficient evidence of any direct effect

on the evaluated employ= ee's status or tenure. *Willamette Industries*, 336 NLRB 743 (2001).<= span style=3D'mso-spacerun:yes'> There is no evidence that the road= tests or route timings have any direct effect on employee job status. Thus, the road tests performed by = driver/foremen of new hires and of drivers seeking new positions are submitted to human resources upon their completion without a recommendation by the driver/fore= men. The factors upon which human resou= rces bases its decision regarding the employee are not described in the record.<= span style=3D'mso-spacerun:yes'> The fact that the driver/foreman m= ay determine whether or not the employee has passed the road test does not amo= unt to an exercise of true supervisory authority. *Brown & Root, Inc.*, 314 NLRB 19, 22 (1994); *Hogan Mfg.*, 305 NLRB 806, 807 (1991). As to route timings, the record ev= idence is that drivers are not disciplined based upon a route timing form submitte= d by a driver/foreman, but rather, are given additional training if needed. Accordingly, the evidence is insufficient to establish that the driver/foremen are statutory supervisors= by virtue of their authority to evaluate employees.

&nbs= p;
Job Descriptions

&nbs= p; *There is conflict in the evidence concerning whether the job descriptions admitted into evidence are currently in effect and accurately describe the duties and authorities of the driver/foremen.*
 <= /span>Even assuming, however, that the driver/foremen job descriptions do apply to the driver/foremen, I conclude that they fail to establish that the driver/fore= men are supervisors under Section 2 (11) of the Act.

Initially, I note that the = Board has held that mere statements of authority contained in a job description a= re insufficient, without more, to establish supervisory status. Bowne of Houston, Inc., supra at 1225. Moreover, the bulk of the authorities described in these documents do not establish supervisory authority. Although the job descriptions state that the driver/foremen “s= upervise the day to day activities of assigned routes and drivers” and are “responsible for driver performance and labor costs related to assign= ed routes and drivers,” the issuance of paper authority which is not exercised does not establish supervisory status. Crittenton Hospital<= /st1:PlaceType>, 328 NLRB 879 (1999). Absent evidence that the driver/foremen exercise supervisory authority under Secti= on 2(11) of the Act, I find that the mere language in these job descriptions d= oes not establish them to be statutory supervisors.

&nbs= p; Secondary Indicia

The Union alleges that several secondary indicia demonstrate that the driver/foremen are statutory supervisors, including the facts that the driver/foremen's rate of pay is slightly higher than that of drivers, that they have received a bonus and been taken to dinner while drivers have not, that they wear different uniforms from drivers, have cell phones that drivers do not, attend separate meetings from drivers, have mandatory overtime, while drivers do not, and have keys to the night supervisor's office while drivers do not. However, where there is no evidence that an individual possesses any one of the several primary indicia for statutory supervisory status enumerated in Section 2(11) of the Act, these secondary indicia are insufficient by themselves to establish supervisory status. Ken-Crest Services, 335 NLRB 777, 779 (2001); J.C. Brock Corp., 314 NLRB 157 (1994). Accordingly, having found no other supervisory indicia present in the driver/foremen, I do not find supervisory status in the driver/foremen based solely on these secondary indicia.

In sum, I find that a unit of drivers, excluding yardmen, constitutes an appropriate unit, and, further, that the Union has not met its burden of establishing that the driver/foremen are supervisors under Section 2(11) of the Act.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and driver/foremen employed by the Employer at its Franklin, Massachusetts facility, but excluding all other employees, yardmen, managers, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

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An election by secret ballot shall be conducted by the Regional Director among the

employees in the unit found appropriate at the time and place set forth in = the notice of election to be issued subsequently, subject to the Board's Rules = and Regulations. Eligible to vote= are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporar= ily laid off. Employees engaged i= n an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike= which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.<= span style=3D'mso-spacerun:yes'> Those in the military services of = the United States may vote if they appear in person at the polls. Ineligible to vote are employees w= ho have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced = more than 12 months before the election date, and who have been permanently replaced. Those eligible shal= l vote whether or not they desire to be represented for purposes of collective bargaining by International Association of Machinists and Aerospace Workers, District 15, AFL-CIO.

LIST OF VOTERS

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&nbs= p; In order to assure that all eligible voters may have the opportunity to be inf= ormed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses whi= ch may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gor= don Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, two co= pies of an election eligibility list containing the full names and addresses of = all the eligible voters shall be filed by the Employer with the Regional Direct= or, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before April 19= , 2006. No extension of time to file this = list may be granted except in extraordinary circumstances, nor shall the filing = of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

 = p; Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, <= st1:address w:st=3D"on">1099 14th Street, N.W., Washington, DC 20570= . This request must be received by the Board in Washington by April 26, 2006. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: w= www.nlrb.gov.

 = p; &= nbsp; = p; &= nbsp; /s/ Elizabeth A. Gemperline

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=

 = p; &= nbsp; = p; &= nbsp; Elizabeth A. Gemperline, Acting Regional Director

 = p; &= nbsp; = p; &= nbsp; First Region

 = p; &= nbsp; = p; &= nbsp; National Labor Relations Board

 = p; &= nbsp; = p; &= nbsp; Thomas P. O'Neill, Jr. Federal Building

 = p; &= nbsp; = p; &= nbsp; 10 Causeway Street, Sixth Floor

 = p; &= nbsp; = p; &= nbsp; Boston, MA 02222-1072

Dated at = Boston, Massachusetts

this 12th day of April, 2006.

[1] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Acting Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[2] The yardmen are also referred to as yard jockeys.

[3] The Union has indicated its willingness to proceed to an election in any unit that I find appropriate.

[4] The Employer took the position that Archambault is a statutory supervisor, while the Union did not take a position regarding Archambault. The record reflects that Archambault spends 70 percent of his time performing the same duties as the yardmen. There is no evidence in the record as to how he spends the remainder of his time or what supervisory authority, if any, he possesses and exercises. Inasmuch as I have determined to exclude the yardmen, including Archambault, from the unit, I find it unnecessary to make a determination with respect to Archambault's supervisory status.

[5] The parties have stipulated, and I find, that Lawrence Bourget, Lou Menard, Ed Syngay, Steve Lussier, Bob Henault, Scott Henault, Art Boutiette, John Zardeskas, Al Mucciarone, Linda Pimental,

Sharon Murray, Brian Nadeau, and Theresa Nadeau are statutory supervisors who should be excluded from any unit found appropriate.

[6] A bossy cart is a four wheel cart with five shelves of milk products. The cart is left in the store by the driver.

[7] Drivers are only allowed to work 4-5 days per week and the Employer delivers product on its routes 6-7 days a week.

[8] Pickups are where a trailer is found not to have all the required product for the order and must be returned to the dock to pick it up.

[9] 325 NLRB 612 (1998)(Board denied employer's request for review of Regional Director's decision to exclude mechanics and the check bay attendant from the petitioned-for unit of drivers and related employees.)

[10] In light of my conclusion that the appropriate unit does not include yardmen, I make no finding based on the record as to the supervisory status of either yardmen supervisor Keith Archambault or yardmen foremen Edward Fortes and Allan Malloy.

[11] Presumably, this contemplates an oral warning that is memorialized in writing.

[12] Of the 10 employee counseling forms signed by Marcotte, eight were also signed by Bourget; the remaining two were step 2 oral written warnings issued to drivers for being late. Two of the three forms signed by driver/foreman James Lapierre were signed by Bourget, but no disciplinary step was indicated on any of them. The one form signed by driver/foreman Jeffrey Trudeau, a step 1 supervisor's discussion, was also signed by Bourget.

[13] The Employer also presented testimony that the drivers' committee is taken to dinner twice a year by the Employer in appreciation for its work.<= /p>

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